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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELASTICSEARCH, INC., a Delaware corporation, ELASTICSEARCH B.V., a Dutch corporation, Plaintiffs, v. FLORAGUNN GmbH, a German corporation, Defendant.	Case No. 4:19-cv-05553-YGR **JOINT UPDATED CASE MANAGEMENT STATEMENT** Date: August 9, 2021 Time: 9:00 a.m. Dept: Courtroom 1, 4th Floor Judge: Hon. Yvonne Gonzalez Rogers

Pursuant to the Court's March 23, 2021 Order (ECF No. 86), Civil Local Rule 16-10(d), this Court's Standing Order in All Civil Cases, and the Standing Order for All Judges for the Northern District of California, the parties hereby submit this Joint Updated Case Management Statement in advance of the Further Case Management Conference scheduled for August 9, 2021 at 9:00 a.m.

I. PROGRESS OR CHANGES SINCE LAST CASE MANAGEMENT CONFERENCE

The following are material changes in this matter occurring since the last Case Management Conference ("CMC") that occurred on December 16, 2019:

- Defendant floragunn GmbH ("floragunn") filed its Answer to Amended Complaint and Counterclaims on December 24, 2019 (ECF No. 33), Plaintiffs Elasticsearch, Inc. and elasticsearch B.V. (collectively, "Elastic") answered the counterclaims on January 28, 2020 (ECF No. 50), and floragunn amended its Answer and Counterclaim to voluntarily dismiss its second counterclaim with prejudice on March 16, 2021 (*see* ECF Nos. 80, 82).

- The parties have engaged in Settlement Conferences before Magistrate Judge Sallie Kim on February 28, 2020 (ECF No. 52) and May 4, 2021 (ECF No. 98). The parties continue to engage in settlement discussions but have not been able to reach settlement.

- Elastic filed a separate complaint alleging additional instances of infringement and copyright registrations on October 26, 2020 (N.D. Cal. Case No. 4:20-cv-07514-YGR). The Court related the 19-cv-05553-YGR case ("*floragunn I*") and the 20-cv-07514-YGR case ("*floragunn II*") on November 4, 2020 (ECF No. 66). Pursuant to the parties' stipulation, the Court consolidated the *floragunn I* and *floragunn II* cases on November 5, 2020 (ECF No. 67). floragunn filed its Answer to *floragunn II* complaint on December 15, 2020 (ECF No. 71).

- The parties have completed fact discovery, including written discovery and depositions, of the parties and certain third parties. Fact discovery closed on May 14, 2021.

- The parties have exchanged opening, rebuttal, and reply expert reports and have agreed on dates for expert depositions. Expert discovery will conclude by August 13, 2021.

- The parties are currently engaged in discovery disputes before Magistrate Judge Tse relating to Elastic's request for the imposition of sanctions for the purported unavailability for deposition of floragunn's former Chief Technology Officer and two software developers (*see* ECF Nos. 100, 101).

- The parties may file dispositive and *Daubert* motions, which are to be heard by October 12, 2021. Trial is scheduled to begin February 28, 2022.

II.   JURISDICTION AND SERVICE

The parties report no material changes since the previous CMC.

III.   FACTS

Plaintiffs' Statement

Elastic owns and markets the Elastic Stack suite of software products. That suite is centered on the Elasticsearch search and analytics engine and includes the Kibana data visualization tool. Elastic offers a set of security, monitoring, alerting, and reporting features, known as X-Pack, that enhance and extend the Elastic Stack suite of products. Elastic owns the copyrights to the Elasticsearch X-Pack and Kibana X-Pack plugins, as well as the copyrights to the Elasticsearch Shield and Kibana Shield plugins, which are the security plugin predecessors to Elasticsearch X-Pack and Kibana X-Pack. (For convenience, Elastic will refer to these offerings collectively as "X-Pack," except where it is necessary to differentiate them.) floragunn markets and distributes Search Guard, a software product that is intended to compete with X-Pack's security and alerting features.

floragunn copied multiple and critical portions of X-Pack into Search Guard and also created unauthorized derivative works of X-Pack, which it implemented in Search Guard. Elastic's *floragunn I* First Amended Complaint ("FAC") and *floragunn II* Complaint identify a pattern of copying and creation of derivative works spanning from February 2016 to August 2019.

The evidence shows that floragunn accessed Elastic's X-Pack source code: the Search Guard developer Hendrik Saly, who until very recently was floragunn's Chief Technology

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1   Officer, has admitted to decompiling Elasticsearch Shield Java binaries, which were widely

2   distributed over the internet, and Elastic will present expert opinion testimony that floragunn's

3   Search Guard source code shows indicia of having been created through reverse compilation. The

4   evidence also shows that Mr. Saly and other Search Guard developers reviewed and analyzed X-

5   Pack source code, which Elastic made source-available in April 2018.

6   Elastic also will present expert opinion testimony that the accused portions of floragunn

7   source code are substantially similar to Elastic source code or were derived from Elastic source

8   code and that the asserted X-Pack source code and the accused floragunn source code are not

9   constrained in relevant part. The infringement Elastic has alleged covers critical portions of

10 Search Guard.

11   Moreover, there are several instances in the accused floragunn's source code that are

12 inconsistent with a theory of independent creation. For example, in one section of copied code,

13 the floragunn developer wrote the comment: "@todo Why the snake case here? What do our

14 permissions look like," indicating that the floragunn developer did not fully understand the code

15 he supposedly wrote.

16   In another instance, floragunn's source code included a commented-out (i.e., non-

17 functional) list of internal action patterns (i.e., sets of actions that the software permit without the

18 presence of a user). These non-functional, commented out internal action patterns were *identical*,

19 down to the selection and order of the action patterns, to functional Elastic code. Furthermore,

20 Elastic had added two of the copied internal action patterns to allow for the function of Elastic's

21 proprietary Marvel software. There is no reason (and floragunn has not been able to identify any

22 reason) that action patterns meant to allow the function of Marvel should be present in

23 floragunn's code, much less in a commented-out form. The only plausible explanation for the

24 existence of copied, non-functional Elastic code in Search Guard is that floragunn copied its code

25 directly from Elastic's code.

26   floragunn has further committed contributory copyright infringement by licensing its

27 infringing Search Guard source code to third parties, including Amazon Web Services, Inc.

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1 ("AWS"). AWS has incorporated infringing Search Guard code into two of its offerings: Amazon

2 Elasticsearch Service, a paid software-as-a-service version of Elasticsearch and Kibana, and Open

3 Distro for Elasticsearch, a free and open source distribution of Elasticsearch and Kibana.

4   ***Defendant's Statement***

5   floragunn categorically rejects that it copied any of Elastic's source code. floragunn's

6 Search Guard product is a security "plugin" for Elasticsearch. A plugin is a software component

7 that adds additional functionality to another computer program. Elasticsearch is a search engine

8 based on an open source library called "Lucene." Lucene is owned by the Apache Software

9 Foundation. Like any program that is based on Lucene, Elasticsearch necessarily relies on a

10 variety of code and syntax that was created by the Lucene programmers. Likewise, Elasticsearch

11 also relies on other third-party libraries, such as the open source "Netty" library. This means that

12 substantial portions of the Elasticsearch computer code are not original to Elastic, and instead are

13 derivative of third party code. Elasticsearch is designed specifically to allow the creation of

14 plugins to extend its functionality. Elastic has long documented the specific means that

15 developers should follow when creating Elasticsearch plugins. The requirements for a plugin to

16 operate necessarily constrain the choices made by plugin developers. This is analogous to third-

17 party upgrade kits for physical appliances; for example, a turbocharger for a car necessarily will

18 need to physically mate with the engine of the car, and thus the design choices for a turbocharger

19 for a Corvette will necessarily be constrained by the physical design of a Corvette. Search Guard

20 likewise must behave in certain ways in order for it to operate with Elasticsearch.

21   Elastic's own X-Pack product likewise is a plugin for Elasticsearch, and thus the design

22 choices for X-Pack were also constrained by the need to operate with Elasticsearch. Just as two

23 turbochargers designed to work with a Corvette will share certain similarities because both must

24 attach to the same engine, Search Guard and X-Pack likewise must share some similarities

25 because both are plugins for the same Elasticsearch product.

26   Furthermore, Search Guard and X-Pack both provide similar functionality for certain

27 features (though the Search Guard product offers more functionality than Elastic's security plug

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1   in). That similarity in functionality acts as a further constraint on the design choices that

2   floragunn and Elastic respectively made in designing their products. Returning to the

3   turbocharger analogy, any turbocharger necessarily will include a turbine—that is because

4   turbochargers use turbines, not because one turbocharger is a copy of another.

5   In addition, there are many "tools of the trade" that are known to many in the developer

6   community, and that draw on tropes common to computer programming. These tropes can result

7   in superficial similarities between independently developed code, especially when the code is

8   reviewed by a lay observer who is not familiar with the common programming conventions that

9   are known to software engineers.

10   Each of the alleged instances of infringement in the complaints in these consolidated

11   actions is without merit because the snippets of source code that Elastic claims were infringed,

12   which together account for a limited number of lines of source code pulled from multiple versions

13   of Search Guard out of more than 60,000 total lines of source code, are simply not protectable by

14   copyright law for, *inter alia*, the reasons set forth above.

15   **IV.   LEGAL ISSUES**

16   At present, the parties identify the following legal issues:

17   •   Whether floragunn has infringed Elastic's X-Pack copyrights by copying and/or creating

18   derivative works from Elastic's asserted X-Pack source code.

19   •   Whether asserted Elastic source code is not protected by copyright due to the doctrines of

20   merger, *scenes a faire,* and other limiting doctrines.

21   •   Whether floragunn has contributorily infringed Elastic's copyrights in X-Pack and the X-Pack

22   Kibana plugin by intentionally inducing and materially contributing to Search Guard users'

23   infringement of Elastic's copyrights in X-Pack and the X-Pack Kibana plugin.

24   •   Whether Elastic is entitled to injunctive relief to restrain floragunn's infringing activity.

25   •   The nature and amount of damages and attorneys' fees to which Elastic is entitled from

26   floragunn's allegedly infringing activity.

27   •   The amount of attorneys' fees to which floragunn may be entitled to the extent that it prevails

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1   against Elastic on Elastic's copyright infringement claims.

2   **V.   MOTIONS**

3   The parties have two discovery letters pending before Magistrate Judge Tse. The first

4   discovery letter (ECF No. 100) seeks sanctions for the refusal of two floragunn software

5   developers to appear at their depositions after having been ordered to appear by Magistrate Judge

6   Tse (ECF No. 97). (Elastic had previously sought to compel the two developers' appearance at

7   depositions. *See* ECF Nos. 79, 84, 93.) The second discovery letter (ECF. No. 101) seeks

8   sanctions for what Elastic contends is floragunn's misrepresentation of the unavailability for

9   deposition of its Chief Technology Officer (whose employment floragunn terminated while the

10   motion was pending).

11   The parties may file *Daubert* motions, as well as motions for summary judgment.

12   Dispositive and *Daubert* motions must be heard by October 12, 2021.

13   **VI.   AMENDMENT OF PLEADINGS**

14   The parties expect no further amendment of pleadings.

15   **VII.   EVIDENCE PRESERVATION**

16   The parties report no material changes since the previous CMC.

17   **VIII.   DISCLOSURES**

18   The parties have complied with the disclosure requirements under Federal Rule of Civil

19   Procedure 26(a). Elastic has served updated disclosures on floragunn throughout this matter and,

20   on March 11, 2021 served its Fourth Amended Initial Disclosures on floragunn. On March 7,

21   2021, floragunn served its First Amended Initial Disclosures on Elastic. The Initial Disclosures

22   exchanged by the parties included the material required by Federal Rule of Civil Procedure 26(a).

23   **IX.   DISCOVERY AND RULE 26(F) DISCOVERY PLAN**

24   The parties have no currently relevant updates to their discovery plan or other discovery

25   agreements to report. The parties have completed fact discovery, which closed on May 14, 2021.

26   The parties anticipate completing expert discovery by August 13, 2021. The parties have

27   exchanged opening, rebuttal, and reply expert reports, have propounded subpoenas for production

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1   of documents on expert witnesses, and have agreed on a schedule for expert witness depositions.

2   **X.   CLASS ACTIONS**

3   This is not a class action.

4   **XI.   RELATED CASES**

5   Case no. 20-cv-07514-YGR is related and has been consolidated with this case.

6   **XII.   RELIEF**

7   *Plaintiffs' Statement*

8   Elastic seeks the following relief:

9   1.   Permanent injunctive relief, including an order restraining and enjoining floragunn

10   and third parties using Search Guard and Search Guard code from further infringement of

11   Elastic's copyrights;

12   2.   Compensatory damages against floragunn, consisting of lost profits from

13   floragunn's copyright infringement and contributory copyright infringement (Elastic has

14   disclosed the amount of damages and the basis thereof to floragunn through Elastic's expert

15   reports, which are marked Attorneys' Eyes Only);

16   3.   To the extent not duplicative, floragunn's profits obtained as a result of its

17   infringing conduct (Elastic has disclosed the amount of profits and the basis thereof to floragunn

18   through Elastic's expert reports, which are marked Attorneys' Eyes Only);

19   4.   Attorneys' fees and costs of suit incurred herein;

20   5.   Interest, including pre-judgment and post-judgment interest, on the forgoing sums;

21   and

22   6.   Any other relief that the Court deems appropriate.

23   *Defendant's Statement*

24   floragunn seeks:

25   1.   Judgment in floragunn's favor, denying all of Elastic's claims in their entirety;

26   2.   Attorneys' fees and costs of suit incurred herein; and

27   3.   Any other relief that the Court deems appropriate.

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XIII. SETTLEMENT AND ADR

Pursuant to assignment at the previous CMC, the parties have engaged in Settlement Conferences before Magistrate Judge Sallie Kim on February 28, 2020 (ECF No. 52) and May 4, 2021 (ECF No. 98). The parties have exchanged settlement proposals and continue to engage in settlement discussions but have not been able to reach settlement. The parties anticipate that the completion of expert discovery on August 13, 2021 and the resolution of the discovery motions currently before Magistrate Judge Tse (including any objections thereto) may further clarify the possibility for negotiated settlement. The parties have complied with ADR Local Rule 3-5.

XIV. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

Not all parties consent to magistrate judge jurisdiction for all further proceedings.

XV. OTHER REFERENCES

The parties do not believe that any references are appropriate.

XVI. NARROWING OF ISSUES

The parties are not at this time aware of any issues that can be narrowed by agreement.

XVII. EXPEDITED TRIAL PROCEDURE/SCHEDULE

The parties do not believe that an expedited schedule is appropriate for this case.

XVIII. SCHEDULING

The remaining deadlines in this case are as follows:

Event	Date
Further Case Management Conference	August 9, 2021 at 9:00 a.m.
Cut-off for expert discovery	August 13, 2021
Last Day for Hearing on Dispositive Motions / Daubert Motions	October 12, 2021
Compliance Hearing	Friday, January 21, 2022 at 9:01 a.m.
Last Day to File Joint Pretrial Conference Statement	January 28, 2022
Pretrial conference	Friday, February 11, 2022 at 9:00 a.m.
Trial Date	Monday, February 28, 2022 at 8:00 a.m. for jury trial.

XIX. TRIAL

Elastic has demanded a jury trial. The parties at this time anticipate a trial of this matter

1   will last no more than one and a half weeks.

2   **XX.   DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

3   *Plaintiffs' Statement*

4   Elastic has filed its Certification of Interested Entities or Persons. Pursuant to the Standing

5   Order for all Judges of the Northern District of California, Elastic restates the contents of its

6   disclosure: Pursuant to Civil L.R. 3-15, Elastic certifies that the following listed persons,

7   associations of persons, firms, partnerships, corporations (including parent corporations) or other

8   entities (i) have a financial interest in the subject matter in controversy or in a party to the

9   proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be

10 substantially affected by the outcome of this proceeding: Elastic N.V., the parent corporation of

11 Plaintiffs.

12   *Defendant's Statement*

13   floragunn filed its Certification of Interested Entities or Persons on November 18, 2019

14 (ECF No. 15). Pursuant to the Standing Order for all Judges of the Northern District of California,

15 floragunn restates the contents of its disclosure:

16   Pursuant to Civil L.R. 3-15, floragunn certifies that the following listed persons,

17 associations of persons, firms, partnerships, corporations (including parent corporations) or other

18 entities (i) have a financial interest in the subject matter in controversy or in a party to the

19 proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be

20 substantially affected by the outcome of this proceeding:

21   Claudia Kressin is the sole shareholder of floragunn GmbH.

22 **XXI.   GUIDELINES FOR PROFESSIONAL CONDUCT**

23   All attorneys of record have reviewed the Guidelines for Professional Conduct for the

24 Northern District of California and agree to abide by these guidelines.

25 **XXII.   OTHER MATTERS**

26   The parties have no other matters to bring to the Court at this time.

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2 Dated: August 2, 2021   DAVID R. EBERHART
                                                   JAMES K. ROTHSTEIN
3   DANIEL H. LEIGH
                                                   O'MELVENY & MYERS LLP
4

5
                                                   By: */s/ David R. Eberhart*
6   David R. Eberhart

7   Attorneys for Plaintiffs
                                                   ELASTICSEARCH, INC. and
8   ELASTICSEARCH B.V.

9

10
    Dated: August 2, 2021   MICHAEL S. KWUN
11   KWUN BHANSALI LAZARUS LLP

12
                                                   By: */s/ Michael S. Kwun*
13   Michael S. Kwun

14
                                                   Attorneys for Defendant
15   FLORAGUNN GMBH

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19   **ATTESTATION**

20   Pursuant to Civil Local Rule 5-1(i)(3) regarding signatures, I attest that concurrence in the

21 filing of this document has been obtained from the other signatory.

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23 Dated: August 2, 2021   */s/ David R. Eberhart*
                                                    David R. Eberhart
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